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Supreme Court, U.S.
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No. 00-1460

In the Supreme Court of the United States

ROGER BATTLE,
Petitioner

versus

JAMES LeBLANC, Warden
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. REVIEW OF A CIRCUIT COURT DECISION IS NOT AN ADVISORY OPINION

In opposition to petitioner's request for a writ of certiorari, respondent asserts that any action by this Honorable Court would "merely amount to an advisory opinion." Contrary to the respondent's assertion, the matter at bar presents a genuine "case or controversy" within the meaning of Article 3, Section 2 of the United States Constitution. The controversy is genuine because should this Court find Battle's petition is timely, the interests of the petitioner may be advanced by a determination on the merits.

A. RESPONDENT'S RELIANCE ON MONTANA V. IMLAY IS MISPLACED

Citing Montana v. Imlay, 506 U.S. 5 (1992), the respondent argues that the petitioner has no possibility of relief regardless of the Fifth Circuit's decision barring his petition as untimely. Montana v. Imlay is inapposite for the following reasons:

The Montana v. Imlay decision resulted because of this Court's determination that the case or controversy presented - whether Mr. Imlay could be required to admit responsibility for his criminal acts as a condition for probation upon completion of a therapy program - was *mooted* by the State and Imlay's *agreement* at oral argument that Imlay would enjoy immunity from prosecution for incriminating statements made during court-ordered therapy. The Montana Supreme Court had previously held that absent immunity, the Fifth Amendment prohibited "augmenting a defendant's

sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." 249 Mont. 82, 91, 813 P.2d 979, 985 (1991). Recognizing that "neither counsel identified any way in which the interest of his client would be advanced by a favorable decision on the merits," this Court reversed its grant of Imlay's petition for writ of certiorari.

In this case, no agreement exists between the State of Louisiana and Roger Battle as to the outcome, or the advancement of Mr. Battle's interests. Mr. Battle seeks access to the federal courts on a first federal habeas petition declared untimely by the Fifth Circuit. The merits of his petition, unlike the petition in Montana v. Imlay, have not yet been decided. Mr. Battle has a substantial, concrete stake in the outcome of his habeas petition, regardless of respondents' predictions of futility. See Sibron v. New York, 392 U.S. 40 (1967) The case or controversy requirement under Article III, § 2 of the Constitution of the United States -

> "...subsists through all stages of federal judicial proceedings, trial and appellate ... The parties must continue to have a 'personal stake in the outcome' of the lawsuit." (*Citations omitted*) This means that, throughout the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.
>
> * * * *
>
> An incarcerated convict's (or a parolee's) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because

> the incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." Spencer v. Kemna, No. 96-7171 523 U.S. 1 at 11.

The respondents are not the proper parties to determine whether Roger Battle's challenge to his conviction has merit. Following the State's line of reasoning, this Court's review of any habeas petition would be an advisory opinion, because it is highly unlikely that the prosecutor would regard meritorious a convict's challenge to his conviction.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH OTHER U.S. COURTS OF APPEALS ON THE SAME FEDERAL QUESTION, ITS OWN JURISPRUDENCE, AND STATE LAW

Denying Mr. Battle access to federal habeas review on the respondent's prediction that he cannot identify any way in which his interests would be advanced begs the question. Mr. Battle's petition sought federal habeas review which the Fifth Circuit ruled untimely, without deciding the merits. Evoking the rule in Slack v. McDaniel, 529 U.S. 473 (2000), that Battle failed to show that jurists of reason would find it highly debatable that the district court erred in dismissing his petition, the Fifth Circuit's decision (a) conflicts with every other circuit court to decide the tolling issue in the context of state procedural law, (b) conflicts with the Fifth Circuit's prior jurisprudence, and (c) mis-applies Louisiana's post-conviction procedural rules.

This Court decided Artuz v. Bennett, 121 S. Ct. 361

on October 10, 2000. Bennett's application for state post conviction relief contained procedurally barred claims. This Court held that those claims did not render it improperly filed under § 2244(d)(2) of Title 28 U.S.C. (1994 ed., Supp. IV), and for purposes of proper filing, the application was properly filed when its delivery and acceptance are *in compliance with the applicable laws and rules governing filings.* The state procedural bars at issue were conditions to obtaining relief, as opposed to conditions to filing. In that opinion, this Court observed in Footnote 2 at 364:

> We express no view on the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed. See, e.g. Smith v. Ward, 209 F. 3d 383, 385 (CA5 2000).

In Smith, *supra*, the Fifth Circuit Court of Appeals, citing its own precedent in Villegas v. Johnson, 184 F.3d 467 (5th Cir. 1999), upheld a Louisiana appellant's state habeas petition *determined by Louisiana courts to be time-barred,* observing that the petition was nevertheless "properly filed" within the meaning of § 2244(d)(2).

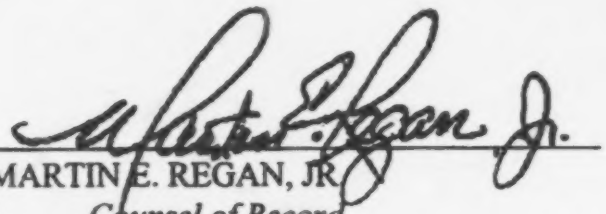
In this case, Mr. Battle *timely* complied with Louisiana laws and rules governing filings. Either the Fifth Circuit dismissed Battle's habeas petition on the interpretation of "pendency" under the tolling provision of 28 U.S.C. 2244(d)(2) repudiated by every other circuit to decide the question, or the Fifth Circuit incongruously and inconsistently interpreted the "pending" provision in contradiction to established Louisiana law and the Fifth Circuit's own jurisprudence.

III. CONCLUSION

Despite respondents' argument that any review by this Court would amount to an advisory opinion, the controversy involved is genuine. If this Court determines that Mr. Battle's petition is timely, the Court may then make a determination on the merits.

WHEREFORE, Petitioner prays this Court GRANT Writ of *Certiorari*, and REVERSE the ruling of the United States Fifth Circuit Court of Appeals dismissing Battle's habeas petition as time-barred.

New Orleans, Louisiana, this 16th day of May, 2001.



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